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Building The Wireless Future.

Michael F. Altschul
Vice President,
General Counsel

September 1, 1993

William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Regulation of Cellular Carriers -- RM No. 8179
Ex Parte Presentation

Dear Mr. Caton:

On Thursday, August 31, 1993, Michael Altschul, Cellular Telecommunications Industry Association ("CTIA"), and Andrew Tollin and Kenneth Patrich, Wilkinson, Barker, Knauer & Quinn, discussed the above-referenced proceeding with Judith Argentieri, Esquire, Staff Attorney in the Tariff Division. The substance of the meeting is set forth in the attached ex parte written presentation, which is submitted herewith in duplicate for inclusion in the above-referenced docket. Copies of this written presentation have been served on Ms. Argentieri.

If there are any questions concerning this submission, please contact me.

Sincerely,

Michael Altschul

Vice President and
General Counsel
Cellular Telecommunications
Industry Association

Enclosures

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September 1, 1993

Gregory J. Vogt, Esq.
Chief, Tariff Division
Federal Communications Commission
1919 M Street, N.W., Room 518
Washington, D.C. 20554

Re: RM No. 8179
Regulation of Cellular Carriers
Ex Parte Written Presentation[1/]

Dear Mr. Vogt:

The Cellular Telecommunications Industry Association ("CTIA")[2/] hereby requests that the Commission shift the focus of the above-referenced proceeding to eliminate -- rather than streamline -- the federal tariff filing requirements applicable to cellular carriers.[3/] This request is prompted by recent amendments to the Communications Act of 1934 ("Act"), enacted into law as part of the Omnibus Budget Reconciliation Act of 1993, which authorize the Commission to exempt providers of "commercial mobile service" ("CMS"), a new class of carriers which includes cellular operators,

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1/ Duplicate copies of these ex parte comments are hereby submitted for inclusion in RM No. 8179.

2/ CTIA is the trade association of the cellular industry. Its members include over 90% of the licensees providing cellular service to the United States and Canada. CTIA's membership also includes cellular equipment manufacturers, support service providers, and others with an interest in the cellular industry.

3/ RM No. 8179 was initiated by the Commission in response to the Request for Declaratory Ruling and Petition for Rulemaking filed by CTIA on January 29, 1993 ("CTIA Petition").

from certain sections of Title II of the Communications Act.[4/] The amendments to the Act give the Commission explicit discretion to exempt CMS providers from federal tariff regulation (47 USC § 203) if it determines that the rates for CMS will remain just, reasonable and nondiscriminatory and that consumers will be protected notwithstanding the adoption of such deregulatory measures. CTIA submits that the record in RM No. 8179, which establishes that cellular carriers are not in a position to exert market power, provides more than enough information for the Commission to tentatively find in a notice of proposed rulemaking that (i) cellular should be detariffed and (ii) designated non-dominant.

Background

The Commission has repeatedly recognized that cellular service is essentially intrastate in nature.[5/] For this reason, the

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[4/] New Section 332(d)(1) of the Act defines "commercial mobile service" as "any mobile service (as defined in Section 3(n)) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public as specified by regulation by the Commission." Cellular carriers are clearly "commercial mobile service" providers under this definition.

[5/] See, e.g., Cellular Communications Systems, 86 FCC 2d 469, 483-84, 504 (1981); The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, 59 RR 2d 1275, 1284 (1986)("Radio Common Carrier Services")("In view of the fact that cellular carriers are generally engaged in the provision of local, intrastate, exchange telephone service, the compensation arrangements among cellular carriers and local telephone companies are largely a matter of state, not federal, concern");
(continued...)

cellular industry, since its inception, was not subjected to a federal tariffing requirement. The Commission instead adopted cellular rules in which it asserted federal primacy over technical standards and licensing issues, but left cellular rate regulation to the states.[6/] Since that time, the Commission has reiterated that cellular carriers are not subject to a federal tariffing requirement.[7/]

The Commission's permissive detariffing came to an abrupt end with the court's decision in AT&T v. FCC.[8/] That decision held that Section 203(a) of the Act requires the filing of tariffs for interstate common carrier services. While the ruling specifically invalidated permissive detariffing as applied to nondominant carriers in the Competitive Carrier proceeding,[9/] it also appeared

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[5/](...continued)
TPI Transmission Services, Inc. v. Puerto Rico Telephone Co., 4 FCC Rcd. 2246 (1989); MTS/WATS Market Structure, 97 FCC 2d 834 (1984).

[6/] See Cellular Communications Systems, 89 FCC 2d 58, 96 (1982).

[7/] See Letter of Gerald Brock, Chief, Common Carrier Bureau, to William Roughton, Bell Atlantic Mobile Systems (October 18, 1988)("Cellular radio service is not now tariffed").

[8/] See AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992), rehearing en banc denied, January 21, 1993.

[9/] Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor (CC Docket No. 79-252), Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979)("Competitive Carrier"); First Report and Order, 85 FCC 2d 1 (1980); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981); Second Report and Order, 91 FCC 2d 59 (1982),
(continued...)

to impose a tariff filing requirement on cellular carriers' provision of interstate services.

The uncertainty created by the decision prompted the filing of CTIA's Petition which sought a nondominant designation for cellular carriers (including streamlined tariffing requirements) and a clarification that the Section 203 tariff filing requirement delineated in AT&T v. FCC was largely inapplicable to cellular carriers because they offer little or no interstate services.

CTIA also submitted comments in CC Docket No. 93-36,[10/] the rulemaking proceeding initiated by the Commission in response to the court's invalidation of permissive tariffing in AT&T v. FCC. In that proceeding, the Commission proposed streamlined tariff regulation for domestic nondominant carriers previously subject to forbearance. In its comments, CTIA urged the Commission to apply

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[9/](...continued)
recon., 93 FCC 2d 54 (1983); Second Further Notice of Proposed Rulemaking, FCC No. 82-187, 47 Fed. Reg. 17,308 (1982); Third Further Notice of Proposed Rulemaking, 48 Fed. Reg. 28,292 (1983); Third Report and Order, 48 Fed. Reg. 46,791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983)("Fourth Report"); Fourth Further Notice of Proposed Rulemaking, 96 FCC 2d 922 (1984); Fifth Report and Order, 98 FCC 2d 1191 (1984), recon., 59 Rad. Reg. 2d (P&F) 543 (1985); Sixth Report and Order, 99 FCC 2d 1020 (1985)("Sixth Report"), rev'd sub nom. MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985)(MCI v. FCC).

[10/] Tariff Filing Requirements for Nondominant Common Carriers, CC Docket No. 93-36, Notice of Proposed Rulemaking, 8 FCC Rcd 1395 (1993)("NPRM").

to cellular carriers the streamlined tariff regulation proposed in the proceeding for nondominant carriers.[11/]

The Commission declined CTIA's request in a decision issued on August 18, 1993,[12/] noting "that because the issue regarding the appropriate regulatory classification of cellular carriers is presently being addressed in a separate proceeding, it is preferable to address the issue in that context."[13/] That decision also made a passing reference to cellular carriers as dominant, although the issue was not involved in the proceeding.

The Relief Now Requested

Section 332(c) of the Act, as recently amended after the filing of Comments in RM No. 8179, authorizes the Commission to exempt CMS providers from any provisions of Title II except

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11/ In addition, on February 4, 1993, CTIA filed a petition for interim waiver of Part 61 of the Rules to simplify the tariff filing requirements applicable to cellular carriers pending development of permanent rules and policies for the industry. That request was granted by the Common Carrier Bureau on February 19, 1993. See Cellular Telecommunications Industry Ass'n Petition for Waiver of Part 61 of the Commission's Rules, Order, DA 93-196 (released Feb. 19, 1993)("Cellular Waiver Order"). The Common Carrier Bureau extended the waiver by Order dated March 31, 1993, in response to an extension request filed by CTIA on March 25, 1993. The portion of the waiver that addressed the tariff form filing requirements was extended indefinitely pending action on CTIA's Petition, but the Bureau only permitted cellular carriers to file new tariffs on less than 45 days notice until June 4, 1993.

12/ See Tariff Filing Requirements for Nondominant Common Carriers, CC Docket No. 93-36, Memorandum Opinion and Order (released Aug. 18, 1993).

13/ Id. at ¶ 14.

Sections 201, 202 and 208. With particular regard to Section 203, the House Energy & Commerce Budget Reconciliation Committee Report clarifies that the Commission "may specify . . . that commercial mobile service need not be tariffed at all,"[14] and notes that, as to CMS providers, the express intent of new Section 332 is to enable the Commission to reinstate the permissive detariffing scheme invalidated in AT&T v. FCC:

> The Committee is aware that the Commission's long-standing policy of permissive detariffing, applied to nondominant carriers, was recently found to be outside the scope of the Commission's authority under Section 203 of the Communications Act. Amer. Tel & Tel. v. FCC, 978 F.2d 727 (D.C. Cir. 1992). By permitting the Commission to "specify" which provisions of Title II of the Communications Act are not applicable to persons engaged in the provision of commercial mobile services, section 332(c)(1)(A) is intended to give the Commission the authority to reinstate this policy with respect to such persons insofar as they are so engaged . . . .[15]

In light of this expanded authority, CTIA requests that the Commission exempt all cellular carriers from the tariff filing requirements set forth in Section 203(a) of the Act. Before granting this relief, however, the Commission must first determine pursuant to Section 332(c)(A)(i) that enforcement of Section 203 is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory; and pursuant to Section 332(c)(A)(ii)

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[14] House Committee Report at 28.

[15] House Committee Report at 28-29.

that enforcement of Section 203 is not necessary for the protection of consumers; in addition, pursuant to Section 332(c)(A)(iii), the Commission must specify that Section 203 is consistent with the public interest. CTIA submits that a decision to not apply Section 203 of the Act to cellular carriers would be consistent with each of these requirements.

In the Competitive Carrier proceeding, the Commission found, as a matter of policy, that tariff regulation of nondominant carriers -- i.e., those lacking market power -- was unnecessary and, in fact, harmful to competition.[16] The Commission adopted the view that such carriers, "precisely because they lacked market power, would be unable to charge unjust and unreasonable rates in violation of Section 201(b) of the Communications Act, or to discriminate unreasonably in violation of Section 202(a) of the Act."[17] Thus, a determination that cellular carriers are not in a position to exercise market power would likewise lead to the conclusion that such carriers would be unable to charge unjust or unreasonable rates or to discriminate unreasonably under the new Act.

Moreover, the Commission has concluded that "traditional tariff regulation of nondominant carriers not only was unnecessary

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[16] NPRM, 8 FCC Rcd at 1395 (citing the Competitive Carrier decisions).

[17] Tariff Filing Requirements for Interstate Common Carriers, CC Docket No. 92-13, Report and Order, 7 FCC Rcd 8072, 8073 (1992).

to ensure lawful rates, but actually would be counterproductive: it could raise carrier costs (and rates), delay new services, and encourage collusive pricing."[18] The same analysis would apply to the cellular industry if it is determined that cellular carriers lack market power. Under the circumstances, a decision to not impose "counterproductive" tariff filing requirements on cellular carriers would clearly be consistent with the public interest. Indeed, as noted by CTIA in its Reply Comments in RM No. 8179, the public interest is not served by giving the two facilities-based carriers in each market more information about each other's prices and services. The same can be said for alerting the competitor about proposed new service packages or offerings.[19] The Common Carrier Bureau was clearly aware of this fact when it recently observed that a cellular carrier's filing of "cost support materials might provide competitors with access to information that is competitively sensitive."[20] Thus, detariffing cellular actually serves to protect consumers and is pro-competitive.

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[18] Id. citing Competitive Carrier Notice, 77 FCC 2d at 313-14, 358-59. The Commission also found that "mandatory tariff regulation of nondominant carriers was in fact at odds with the fundamental statutory purpose set forth in Section 1 of the Act because it inhibits price competition, service innovation, entry into the market, and the ability of firms to respond quickly to market trends." Id. at 8079, ¶ 36.

[19] See Reply Comments of the Cellular Telecommunications Industry Association in RM No. 8179 at 25-26.

[20] Cellular Waiver Order at ¶ 6.

In summary, a finding that cellular carriers do not possess market power would be tantamount to making the very determinations called for in Sections 332(c)(1)(A)(i)-(iii).

Cellular Carriers Do Not Possess Market Power

The basic concept of market power is "the ability to raise prices by restricting output".[21] This behavioral pattern has not occurred in the cellular industry. Indeed, the contrary is true -- the cellular business has been characterized by rapidly expanding demand and reduced prices. The cellular industry reached the million-customer mark in 1987,[22] exceeded 11 million subscribers in 1992, and it is projected that 15 million people will subscribe to cellular by the end of 1993.[23] Even with this growth, only about 5% of the potential market has been tapped to date.

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[21] First Report and Order, 85 FCC 2d 1, 10 (1980).

[22] Geodesic Network II 1993 Report on Competition in the Telephone Industry ("Geodesic Network II") at 4.22.

[23] The explosive growth of the cellular industry is largely attributable to the Commission's adoption of rules and polices designed to promote a competitive environment. The Commission's decision in 1981 to license two cellular carriers per market was based on the premise that competition would "foster important public benefits of diversity of technology, service and price, which should not be sacrificed absent some compelling reason." An Inquiry Into the Use of Bands 825-845 MHz and 870-890 MHz for Cellular Communications Sys., 86 FCC 2d 469, 478 (1981). The Commission concluded three years later that its licensing policies had "resulted in a highly competitive market structure in which two carriers with different histories and different approaches vie with one another in the marketplace." Cellular Lottery Rulemaking, 98 FCC 2d 175, 196 (1984).

Moreover, market shares have fluctuated significantly since 1984, and despite the headstart for wireline carriers in many markets, non-wireline licensees have attained nearly equal market share in total and have exceeded the market share of the wireline carrier in some markets.[24/] Penetration rates for both wireline and non-wireline carriers are comparable.[25/] Analysts estimate that 21.6 percent of cellular subscribers switch to the competing cellular carrier annually, inspired by price and service competition,[26/] and the U.S. International Trade Commission recently concluded that "cellular service providers are competing in terms of price".[27/]

As demand has grown, the price for cellular service has dropped. The General Accounting Office recently noted that the price of cellular service in the 30 largest U.S. markets fell by 27 percent in real terms from 1985 to 1991.[28/] By the beginning of

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24/ Assigning PCS Spectrum: An Economic Analysis of Eligibility Requirements and Licensing Mechanisms, National Economic Research Assoc., Inc. (November 9, 1992) at 10.

25/ Id.

26/ Competing for the Consumer, Cellular Brief (CTIA, Washington, D.C.), Jan. 22, 1993 (referring to study by Economic and Management Consultants International).

27/ U.S. Int'l. Trade Comm'n, Global Competitiveness of U.S. Advanced-Technology Industries: Cellular Communications, June 1993, p. 3-3.

28/ GAO, Concerns About Competition in the Cellular Telephone industry, pp. 23-24. Herschel Shosteck Associates reported a 29 percent drop from 1985 to 1992.

1993, the average monthly bill had fallen to $68.68, down from $96.83 in 1987.[29]

The availability of existing and future services that serve as substitutes for cellular will further enhance competition in the industry. The Commission already has authorized Nextel Communications (formerly Fleet Call) and other enhanced SMR providers to reconfigure their SMR services in ways that will permit such services to provide a direct substitute for cellular.[30] Nextel is now providing digital ESMR service in Los Angeles, and nationwide deployment of these systems is underway. The Commission's allocation of spectrum for personal communications services and mobile satellite services will soon provide additional alternatives to existing cellular services.[31]

Moreover two federal courts have determined that a cellular licensee did not possess monopoly power -- even during the headstart period when it was the only facilities-based carrier in

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[29] CTIA year-end 1992 survey.

[30] Fleet Call, Inc., 6 FCC Rcd 1533 (1991).

[31] For additional statistics illustrating the high level of growth and competition in the cellular industry, see CTIA Comments in RM No. 8179 at 17; Reply Comments at 20-24.

operation.[32] The courts concluded that the licensee lacked market power and was unable to control prices or exclude competition.[33]

In conclusion, the comments submitted in RM No. 8179, as amplified herein, show an industry marked by explosive growth and healthy competition -- developments which occurred when no federal tariffing requirement was in effect. With the introduction of new substitutable services, such as Nextel's Enhanced SMR service and

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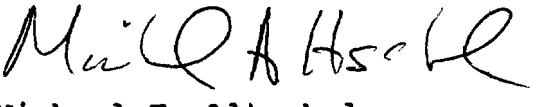
[32] See Metro Mobile CTS, Inc. v. NewVector Communications, Inc., 892 F.2d 62 (9th Cir. 1989); Metro Mobile CTS, Inc. v. NewVector Communications, Inc., 661 F. Supp. 1504 (D. Ariz. 1987).

[33] The Commission recently asserted that cellular carriers "were previously declared dominant in the Fifth Report." Tariff Filing Requirements for Nondominant Common Carriers, CC Docket No. 93-36, Memorandum Opinion and Order, (released Aug. 18, 1993) at ¶ 14. This is a misleading characterization. A carrier is considered dominant if it is found to possess "market power (i.e., power to control price)." First Report and Order, 85 FCC 2d 1, 10 (1980). The Commission has never made any such finding with respect to the cellular industry. Indeed, in the Fourth Report the Commission noted that "cellular mobile radio services" are "[a]mong the classes of carriers not heretofore considered in this rulemaking . . . ." 95 FCC 2d at 582. And in the Fifth Report (the reference relied on by the Commission for the assertion that cellular carriers have been "declared" dominant), while the Commission stated that "dominant regulation applies to . . . cellular mobile radio services," it added that "[w]e have not yet examined the market power of [cellular] carriers . . . ," 98 FCC 2d at 1204 n.41, a fact recently reiterated by the Common Carrier Bureau. See Waiver Order at ¶ 5. ("Cellular's status as an interstate dominant carrier is obscured by the absence of any direct examination of the competitiveness of cellular service in the interstate communications market"). It is clear that cellular's treatment as "dominant" is not based on the requisite finding of market power called for in the First Report but rather on the absence of any finding whatsoever. The distinction is significant insofar as the Commission need not reverse an earlier finding in order to make the determinations that are a necessary prerequisite to the relief requested herein.

PCS, competition in the industry can be expected to intensify. The retention of a tariff filing requirement in these circumstances would be counterproductive, as the Commission has already observed. Accordingly, CTIA respectfully urges the Commission to issue a notice of proposed rulemaking proposing to delineate cellular as "nondominant" and to exempt cellular from the tariff filing requirement in Section 203, as authorized under Section 332 of the Act, as recently amended.

Respectfully submitted,

Cellular Telecommunications
Industry Association



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